IN THE
SUPREME COURT OF THE UNITED STATES
December Term, 1980

NO. 80-5920

VICTOR E. GOODE, APPELLANT

vs

STATE OF OHIO, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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12-10-80

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Victor E. Goode, the Appellant, appeals from the final judgment of the Supreme Court of Ohio, dated September 12, 1980, sua sponte, dismissing the appeal on the grounds that no substantial Constitutional question existed. This holding denied the Appellant his right to confront witnesses and due process of law in violation of the Sixth and Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The dismissal by the Supreme Court of Ohio, which appears in the Appendix hereto, p. 3, infra., is unreported.

That dismissal, in essence, affirmed the Second Appellate District Court of Appeals Decision rendered on the 15th day of April, 1980, p. 8, infra. That decision was the second decision entered by that Court. The first decision rendered by the Court of Appeals was a limited reversal, p. 16, infra., rendered on April 24, 1979. The original appeal was as a result of a guilty finding entered in the Common Pleas Court of Greene County on June 14, 1978, p. 29, infra.

JURISDICTION

The judgment of the Supreme Court of Ohio, dismissing the appeal, was entered on September 12, 1980, See p. 3 , infra.

A supplemental Notice of Appeal to this Court was duly

filed in the Supreme Court of Ohio on November 6, 1980. See p. 1, infra.

This appeal is being docketed with this Court within 90 days from the dismissal of the appeal below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments to the United States Constitution confer upon the Defendant the right to use the transcript testimony of the chief prosecution witness taken in a co-Defendant's juvenile trial for his use during preparatory and trial stages of a criminal proceeding. Also whether Ohio's "rape shield statute", O.R.C. §2907.02(D) is unconstitutional on its face in that evidence relevant to the issue of consent and state of mind of the prosecuting witness, such evidence which was not directed at "specific" intances of sexual activity or opinion or reputation evidence of victim's sexual activity should not be excluded due to the protection of the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and

subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Criminal Rule 16(B)(1)(g):

In Camera Inspection of Witness' Statement. Upon completion of a witness' direct examination at trial, the court, on motion of the Defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist, the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Ohio Juvenile Rule 37:

(A) Recording of Hearings. In all juvenile court hearings, upon request of a party or upon the court's own motion, a complete record of all testimony, or other oral proceedings shall be taken in shorthand, stenotype or by any other adequate mechanical or electronic recording device.

(B) Restriction on Use of Recording or Transcript. No public use shall be made by any person, including a party, of

any Juvenile Court hearing, including the recording or a transcript thereof, of any Juvenile Court hearing, except in the court of an appeal or as authorized by order of the court.

Ohio Revised Code §2907.02(D):

Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy or disease, the defendant's past sexual activity with the victim or is admissible against the defendant under §2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

RAISING THE FEDERAL QUESTION

Prior to trial, defense counsel questioned the constitutionality and applicability of Ohio's rape shield statute, R.C.§2907.02 (D) as to certain proffered testimony, p. 34, infra. At trial, defense was denied the use of said testimony, per the aforementioned statute, in direct contravention of Appellant's right to present a full and adequate defense.

Defense had also, prior to trial, requested the juvenile court transcript of the trial of the co-defendant. This request was denied on the basis of Juv. R. 37 as was defense's later request to have the transcript made part of the record for appeal.

These denials constitute reversible error in light of the direct infringement upon Appellant's Constitutional rights.

The Court of Appeals found that Appellant was entitled to limited inspection of the juvenile transcript to determine the existence of any inconsistencies between the testimony at the adult trial and the previous trial testimony. Upon this limited reversal, the case was then remanded to the trial court to determine if such inconsistencies resulted in prejudice to Appellant. Appellant asserts that he was not only prejudiced by the trial court's refusal as recognized by the Court of Appeals, but also by and through the remedy granted by the Court of Appeals. The subsequent determination by the trial court that no substantial inconsistencies existed did little to alleviate the prejudice to the Appellant in not having the transcript prior to the cross-examination of the prosecuting witness. An ineffective cross-examination has been said to have been as lacking as no cross-examination at all. Appellant's rights guaranteed by the United States Constitution were not adequarely protected by the remedy of the Court of Appeals.

At every level of this appeal, Appellant has asserted that R.C. §2907.02(D) is both unconstitutional on its face and as applied in the case at bar. The trial court relied upon the statute to prohibit the introduction of certain proffered testimony which by today's standards was not inflammatory and was the most highly probative defense evidence in that it dealt with the main assertion of Appellant - the issue of consent and state of mind of the prosecuting witness. The Constitution guarantees the Appellant the opportunity to present a full and adequate defense to any charges brought against him. Yet this statute as promulgated by the State of Ohio denies him that right. The bald assertion that public policy demands such a statute is not applicable when the proffered testimony is of no inflammatory nature.

STATEMENT OF THE CASE

On or about February 23, 1978, the Greene County Grand Jury returned an indictment that Victor E. Goode violated Ohio Revised Code §2907.02(A)(1). Mr. Goode was arraigned before Judge Aultman on March 3, 1978, at which time a "not guilty" plea was entered.

Shortly after arraignment, counsel for the Defendant contacted Judge Hager of the Greene County Common Pleas Court, Division of Domestic Relations, Juvenile Branch, to arrange for the purchase of the trial transcript of a juvenile co-defendant who had been tried and convicted in the Greene County Juvenile Court prior to the date of Mr. Goode's arraignment. Judge Hager relying upon Ohio Juvenile Rule 37, denied the request of defense counsel. Shortly after that denial, defense counsel made an oral motion in the General Division of the Greene County Common Pleas Court requesting the trial judge in the Defendant's case to order that the Juvenile Branch provide the Defendant with the opportunity of purchasing this trial transcript which contained the testimony of the chief prosecuting witness, Karen Sherlock, and the examining medical witness, Dr. James Goldey. Judge Kimmel considered this oral motion on May 12, 1978.

At the same hearing, in camera arguments were made as to the applicability of O.R.C. §2907.02(D) to certain questions which defense counsel anticipated asking the complaining witness at trial.

At that hearing, Judge Edward Kimmel held that defense counsel would not be permitted to question the prosecuting witness concerning the fact that she was living with a male, Chris Roberts, for a significant period of time prior to the alleged rape on the basis of Ohio Revised Code §2907.02(D). In addition, the court overruled the Defendant's request for a transcript of the juvenile court trial testimony which request was specifically directed to the testimony of the complaining witness, Karen Sherlock, and/or the testimony of the examining

physician in the case, Dr. James Goldey, who were the sole witnesses against the juvenile co-defendant.

On June 8, 1978, a written Motion for Reconsideration of the previous ruling of the court concerning the transcript of the juvenile court proceedings was filed by counsel for Defendant and overruled by the court on the morning of the trial.

Prior to commencement of trial, an in camera discussion was held concerning the additional evidence about the prosecuting witness which was discovered between May 12, 1978 and June 12, 1978. A summary of that evidence is as follows: Defense counsel requested permission to cross-examine the prosecuting witness concerning these matters, which request was denied by the trial court.

Subsequent to a chambers,hearing voir dire examination was held, a jury was duly impaneled and a jury view was held without objection by either party and the trial commenced. The testimony continued for two days with final arguments being held on June 14, 1978. After arguments by counsel concerning the instructions, the court instructed the jury only on the charge of rape. After final arguments and the court's charge, the jury retired and returned the verdict of "guilty" to the criminal charge in the indictment. Defendant waived pre-sentence investigation and the court subsequently imposed a sentence of four to 25 years to run consecutively with any sentence previously imposed against Defendant.

An objection to the proposed Judgment Entry concerning the final order of the court was filed by defense counsel, which objection was overruled by the court. Defendant moved the court for an order to furnish the transcript of the juvenile court proceedings previously mentioned for the purposes of the appeal. The court ruled that the appeal contemplated by Juvenile Rule 37 was an appeal on behalf of the juvenile and not a co-defendant and therefore, overruled this Motion for a transcript. The court

approved the Judgment Entry entered on July 7, 1978, p.27, infra., and a timely Notice of Appeal, p. 5 , infra., was filed.

Eight Assignments of Error were raised in the Court of Appeals during the first appeal of this matter. After briefs were filed and oral arguments held, the Court of Appeals for Greene County, Second Appellate District, reversed the judgment of the trial court, holding that the principles of State v. White, 15 Ohio St. 2d 146 (1968) required the trial court to hold an in camera inspection of the previous trial testimony of the prosecuting witness to determine whether there were any inconsistencies between the two sets of testimony. The court further ordered that if the trial court, on remand, found that discrepancies existed which prohibited the Defendant from receiving a fair trial and denied him due process of law, the court should order a new trial.

Upon remand, the trial court, without giving the Defendant the opportunity to participate in an in camera hearing allegedly compared the transcript of the juvenile court case of the co-defendant, Richard Mayes, with the trial testimony in the case of the Defendant, Victor Goode. The court found the testimony to be identical as to the elements in the crime and the factual description of the evening. A Judgment Entry was filed on May 29, 1978, p. 14, infra., recording this finding.

Subsequent to the filing of this Judgment Entry, defense counsel requested a reconsideration of the court's order on the basis that the court had committed error by not providing defense counsel with an opportunity of participating in the in camera hearing which was mandated by the principles of the White, supra., case which had been relied upon by the Second District Court of Appeals. Accordingly, an in camera hearing was held on June 13, 1979 with defense counsel and the prosecution present. Subsequent to that hearing, briefs were filed concerning discrepancies between the two trial transcripts. Despite the

fact that the prosecution admitted that there was at least one discrepancy between the testimony of the chief prosecution witness at the trial of the juvenile defendant when compared to the testimony given in the adult Defendant's trial, the trial court ruled on July 23, 1979, p. 12, infra., that the objections of the Defendant were not well-taken and affirmed its previously entered Judgment Entry of May 29, 1979.

A timely Notice of Appeal was filed appealing from the Judgment Entry rendered on July 23, 1979. After briefs were filed and oral arguments held on the second appeal, the Court of Appeals for Greene County, Second Appellate District, reaffirmed its ruling on the original eight Assignments of Error raised by the Defendant and overruled the Ninth Assignment of Error which related to the trial court's ruling on remand.

A timely Notice of Appeal to the Supreme Court of Ohio was filed on May 15, 1980, p. 5, infra.. Memorandums in Support and Opposing Jurisdiction were filed by both sides after which, on September 12, 1980, that court dismissed the appeal, p. 3 , infra., stating that no substantial Constitutional question existed therein. It is upon that dismissal that we are before this Court today, for a determination of the Appellant's heretofore infringed upon Constitutional right to a fair trial.

THE QUESTION IS SUBSTANTIAL

The Constitutional right of a defendant in a criminal case to confront his accusers is embodied in the Sixth Amendment to the United States Constitution which was made applicable in its entirety to state proceedings through the due process clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.C. 1065 (1964).

In the instant case, the Appellant, well before trial, contacted the juvenile court judge to arrange for the preparation of the trial transcript of the juvenile co-defendant. Judge Hager denied that request. On May 12, 1978, an oral Motion

was made by counsel for Defendant requesting the trial court to permit the Defendant to obtain the transcript. The record below reflected that the co-defendant, Richard Mayes, was tried in February, 1978, and was convicted upon the testimony of the chief prosecuting witness, Karen Sherlock, and the examining physician, Dr. James Goldey. The juvenile co-defendant did not take the the stand.

On May 18, 1978, Judge Edward R. Kimmel reflected in his Judgment Entry that the juvenile court judge had previously denied the request for the transcript based upon the authority of Ohio Juv. R. 37(B). Judge Kimmel affirmed the position of the juvenile court and denied the Defendant the opportunity of obtaining the trial transcript testimony of the two chief prosecution witnesses who the defense anticipated would testify against the adult Defendant. In denying the Defendant the opportunity of obtaining a copy of the transcript of the juvenile court testimony, the court relied on Juv. R. 37(B), which provides:

> No public use shall be made by any person, including a party, of any juvenile court record, including the recording or transcript thereof, of any juvenile court hearing, except in the course of an appeal or as authorized by order of the court.

It is apparent from the test of Juv. R. 37(B) that the trial court had discretion to permit the Defendant to obtain the transcript. The obvious policy reason behind Ohio Juv. R. 37(B) is to protect the privacy of the juvenile. Here, however, the juvenile in question did not testify. In fact, the testimony in question was that of the prosecuting witnesses. Further, the appeal time had run with respect to the juvenile case. The result of the trial court's ruling was to protect the privacy of the prosecution witnesses with a resultant restriction of the Defendant's right to properly prepare for trial. There can be no doubt that this transcript was the key to preparing for cross-examination of the prosecuting witnesses. The Ohio Supreme Court, in the case of State v. Cox, 42 Ohio St. 2d 200, 327 N.E. 2d 639 (1975) weighed the state interest of protecting the con-

fidentiality of juvenile records against the interest of a defendant preparing for trial. Although the facts were somewhat different, the basic principles involved are the same. The court held at p. 672:

> Although the General Assembly may enact legislation to effectuate its policy of protecting the confidentiality of juvenile records, such enactment may not impinge upon the right of a defendant in a criminal case to present all available, relevant and probative evidence which is pertinent to a specific and material aspect of his defense.

In Cox, supra., the trial court excluded certain testimony which would have established the prior juvenile record of a prosecuting witness. That court held that such exclusion constituted prejudicial error and the decision of the Court of Appeals was reversed and the case remanded to the trial level for a new trial.

This Court had decided a similar question in the case of Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347 (1974). In that case, this Court considered whether an Alaska statute could prohibit cross-examination of a prosecution witness concerning his possible bias where his prior adjudication as a juvenile delinquent would have been established. In balancing the competing interests involved, Justice Berger stated at p. 320, 415 U.S. 308:

> The state's policy interest in protecting the confidentiality of a juvenile offender's record cannot require the yielding of so vital a Constitutional right as the effective cross-examination for bias of an adverse witness. Id.

This Court also held on p. 319 that:

> In this setting, we conclude that the right of confrontation is paramount to the state's policy of protecting the juvenile offender. Whatever temporary embarrassment might result to Greene or his family by disclosure of his juvenile record -- if the prosecution insisted on using him to make its case -- is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness. Id.

Thus, the Supreme Court of the United States and the Supreme Court of Ohio have both decided that statutes similar to Ohio Juv. R. 37(B) do not limit the Constitutional right of the De-

fendant to a full and effective cross-examination of an adverse witness.

The Court of Appeals in its first decision acknowledged that the Defendant's Constitutional right of confrontation outweighed the interest protected by the trial court's ruling prohibiting the Defendant from obtaining a copy of the juvenile court trial transcript. These Constitutional rights, though acknowledged, remained unprotected by the remedy imposed by the Court of Appeals.

The Court of Appeals, through its limited reversal, remanded the case to the Common Pleas Court for the sole purpose of permitting the court to follow the procedures outlined in the case of State v. White, 15 Ohio St. 2d 146 (1968). In White, the Ohio Supreme Court held that a trial court was required to determine in an in camera hearing whether inconsistencies existed between the statements of a witness and the testimony that that witness gave at trial. The court went on to rule that if the trial court found that discrepancies existed which prohibited a Defendant from receiving a fair trial and denied him due process of law, the trial court should order a new trial. Despite the fact that there is a significant difference between a written statement given to police authorities, as was involved in the White case, and prior trial testimony of prosecution witnesses given under oath against a co-defendant, the Court of Appeals for the Second Appellate District concluded that the remedy outlined in State v. White, supra., adequately protected the Defendant's right of confrontation. Appellant believes that this remedy is inadequate.

The function of a jury is to determine the credibility of each and every witness. Without the use of the transcript prior to cross-examination, the jury is denied the opportunity to rate the credibility of the prosecution witness in light of an effective cross-examination made through the use of said transcript. An ineffective cross-examination is no better than

no cross-examination at all. Appellant "needed" said transcript to present his defense fully. In Britt v. North Carolina, 404 U.S. 226, 92 S.C. 431, (1971), this Court stated two factors relevant to the determination of "need" as follows:

> (1) ...the value of the transcript to the defendant in connection with the appeal or trial for which it is sought; and (2) the availability of alternative devices that would fulfill the same function as the transcript.

This Court further said at p. 228:

> Even in the absence of specific allegations, the value of a transcript of that record to the defense can ordinarily be assumed. Id.

In the instant case there has been absolutely no showing on the part of the prosecution that any alternative device would fulfill the same function as the trial transcript. In point of fact, there is no alternative device which could come close to providing the defense with as effective a tool for preparation as the trial transcript against a co-defendant. The prejudice to the Defendant-Appellant is heightened by the fact that the remedy elected by the Court of Appeals of Greene County permitted the trial court to make the determination of what would be useful to the defense. This Court has previously found that the trial court should not usurp the duty of trial counsel to determine what would and would not be effective in the defense of a criminal defendant.

In Dennis v. United States, 384 U.S. 855, 86 S.C. 1840, (1966) 16 L. Ed. 2d 973, this Court held:

> The determination of what may be useful to the defense can effectively be made only by counsel. The trial court judge's function in this respect is limited to deciding whether a case has been made for production and to supervise the process.

In the U.S. Report at 875, the Court stated:

> In our adversary system, it is enough for the judges to judge. The determination of what may be useful to the defense can properly be made only by an advocate.

The decision by the Court of Appeals clearly was contra to the ruling in Dennis in that it took away from counsel, who most

probably had the most thorough understanding of all aspects of the case, the task of determining what was and what was not important to the defense of the accused.

The initial decision in White was rendered in 1968. Subsequent to the pronouncement of the Ohio Supreme Court in White, the Ohio Rules of Criminal Procedure took effect on July 1, 1973. Appellant here asserts that the principles announced in White have been expanded nor contracted by Ohio Criminal Rule 16(B)(1)(g). Where a Defendant in a criminal case has been denied an in camera inspection to determine whether there are inconsistencies in the testimony given by the chief prosecuting witness in different trials of co-defendants, the trial court must no longer find that the discrepancies which existed prohibited the Defendant from receiving a fair trial and denied him due process of law. Subsequent to the promulgation of Ohio Crim. R. 16(B)(1)(g), if the trial court finds that any inconsistency existed between the two sets of testimony, the defendant is entitled to make full use of the witness statement.

Ohio Crim. R. 16(B)(1)(g) provides:

> Upon completion of a witness' direct examination at trial, the court, on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.
>
> If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

It is clear that Crim. R. 16(B)(1)(g) expanded and clarified the pronouncements of State v. White, supra.. This proposition was discussed in the case of State v. Ellis, 46 Ohio App. 2d 102 (1975) in which case the Court of Appeals for Cuyahoga County held at ps. 104-105:

> Crim. R. 16(B)(1)(g) is certainly no contraction of the principles of the White case. At very least, it expands and clarifies that case. Moreover, the Criminal Rules are designed to 'provide for the just determination of every

criminal proceeding'. Crim. R. 1(B).

The rule says nothing as to the degree of inconsistency necessary. It is for that reason that Appellant asserts that upon the finding of any inconsistency, as delineated in the Criminal Rule, subsequent to the denial of the use of such previous testimony at the time of the initial cross-examination, the court should have ordered a new trial and provided the previous transcript for the use of the defense to assist in the trial preparation.

The other error asserted by Appellant is in regard to the constitutionality of Ohio's Rape Shield Statute, O.R.C. §2907.02(D). Appellant asserts that exclusion of testimony which is relevant to a prosecuting witness' state of mind on the evening of an alleged crime, which is not evidence of 'specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, or reputation evidence of the victim's sexual activity', but which may be indirectly related to sexual activity of the prosecuting witness due to R.C. §2907.02(D), makes the statute unconstitutional. Prior to trial, counsel for Defendant informed the trial court and the prosecutor of his intention to introduce evidence concerning the following two matters: (1) the fact that the prosecuting witness, Karen Sherlock, had been living with one Chris Roberts for an extended period of time. Mr. Roberts was the man whom the prosecuting witness was going to see when she left Columbus, Ohio, hitchhiking at 4:30 a.m. "because I just had to see him"; (2) in June, 1977, Karen Sherlock had an aborted pregnancy. The aborted child was Mr. Roberts'. The original proffer of evidence was made at a hearing held on May 12, 1978, in the chambers of Judge Kimmel. A Judgment Entry was filed in Greene County Common Pleas Court on May 18, 1978, which established guidelines under §2907.02(D), which prohibited defense counsel from questioning the complaining witness concerning this live-in relationship of the prosecuting witness with Chris Roberts. See ps. 32-34, infra.

This particular evidence was extremely important in ex-

plaining the great degree of emotional distress and anger she felt with her boyfriend, Chris Roberts, who, unbeknownst to Karen Sherlock, had been seeing another woman while living with her. The defense contended from the outset that the sexual conduct was consensual and not as a result of force nor threat of force.

The sole argument of the prosecutor against the admission of evidence was that such admission was barred by the shield of R.C. §2907.02(D) which provides:

> Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy or disease or the victim's past sexual activity with the offender and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Sober reflection upon the introductory language of R.C. §2907.02 leaves no doubt that the statute was not designed to exclude evidence such as the live-in relationship of this particular prosecuting witness or of an abortion. Such evidence is not: (1) evidence of specific instances of the victim's sexual activity; or (2) opinion evidence of the victim's sexual activity; or (3) reputation evidence of the victim's sexual activity. Rather, this evidence directly reflects upon the state of mind of the prosecuting witness on the night in question. The entire prosecution's case hinged on the stability of Karen Sherlock. The excluded testimony would have established the fact that she had every reason to be irrational on that night.

The Ohio Supreme Court has held in the case of State v. Gardner, 59 Ohio St. 2d 14 (1979) that a balancing test must be employed to determine whether the state interest served by R.C. §2907.02(D) outweighs the probative value of excluded evidence. It is Appellant's position, however, that the application of the balancing test does not protect a defendant in a criminal case. What occurred below and will continue to occur

in Ohio trial courts unless this Court accepts jurisdiction of this case and explicitly provides guidelines as to the constitutionality of R.C. §2907.02(D), is that the prosecution in rape cases will use the shield statute to limit the cross-examination of prosecuting witnesses to matters which even indirectly relate to sexual activities. The tragedy of this application is readily apparent when considering the excluded testimony in the instant case. Here is a young woman who leaves Columbus, Ohio, at 4:30 a.m., hitchhiking to see her ex-boyfriend because she has to see him as soon as possible. Such actions are not rational. The jury, however, was not permitted to hear the evidence which would have explained the depth of the irrationality on the part of the prosecuting witness. Rather, the shield statute permitted the jury to speculate that this was just some college girl who was walked back to the dormitory by her boyfriend every night. The prosecution, the defense, the court and the prosecuting witness knew differently. However, this critical testimony which should have been weighed by the triers of fact was excluded from their consideration by an overextension of the protections granted to the prosecuting witness under R.C. §2907.02 (D).

In Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d §307 (1974), this Court was confronted with a conflict between a state statute designed to protect the identity of juvenile offenders and the Constitutional right to confrontation of witnesses through cross-examination:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.... A more particular attack on the witness' credibility is effected by means of cross-examination directed towards revealing possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony'. 3A, J. Wigmore, Evidence, §940, p. 775 (Chadbourn Rev., 1970).
>
> We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

In light of the recognized importance of cross-examination and the fact that the proffered evidence related directly to the state of mind of the victim and only indirectly to any previous sexual activities, the court erred in not allowing the proffered evidence. Should the Court decide that the balancing test as express in Gardner, supra., is applicable to the case at bar, the evidence should still have been admitted. This proffered evidence concerning the live-in relationship of the prosecuting witness as well as the evidence concerning her previous abortion was clearly probative of the state of mind of the prosecuting witness on the night of this occurrence and her susceptibility towards actions that might be viewed as penalizing her estranged lover. The public acceptance of legalized abortion as well as the increased number of cohabitants outside matrimony does not make this evidence unduly inflammatory or prejudicial. Further this evidence does not concern any specific sexual acts, as the evidence did not attempt to identify any particular date in which sexual relations occurred. The defense proffered the evidence to show the depth of the involvement of the prosecuting witness with her boyfriend in an attempt to expose her volatile emotional state after she learned that her boyfriend had become involved with another woman. This evidence directly relates to the theory of consent raised by the Appellant.

How is the Appellant to assert adequately his defense of consent if he is barred from amplifying the extent of the prosecuting witness' irrational conduct? Under today's norms, a person is no longer chastzied for conduct similar to that of the prosecuting witness prior to the night in question. When a person's actions are difficult to explain, such difficulty is greatly heightened when the defendant is prohibited from presenting any background information to the jury. Ohio's Rape Shield Statute, both on its face and as applied, is an unconstitutional denial of Appellant's right of confrontation as guaranteed by the Sixth Amendment.

CONCLUSION

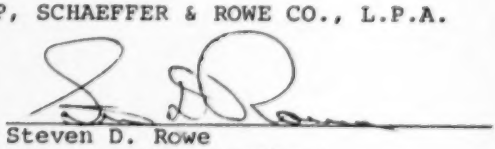
The defendant in a criminal case must be given all available tools to present a full and adequate defense. When a critical tool for proper cross-examination is denied defendant an after-the-fact determination of the value of said tool does little, if anything, to rectify the error. The Appellant herein should be granted a new trial at which time he should have at his disposal the use of said critical tool prior to cross-examination.

Ohio's Rape Shield Statute, R.C. §2907.02(D), is unconstitutional on its face in that it prohibits the introduction of highly relevant evidence which is crucial to the defendant's case. The exclusion of such evidence is directly contrary to the Sixth Amendment to the Constitution.

It is for the aforementioned reasons that the Appellant strongly urges this Court to accept jurisdiction of this appeal.

Respectfully submitted,

KEMP, SCHAEFFER & ROWE CO., L.P.A.

By: 

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IN THE
SUPREME COURT OF THE UNITED STATES
December Term, 1980

NO.

VICTOR E. GOODE, APPELLANT

vs

STATE OF OHIO, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF OHIO

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Appellant's Jurisdictional Statement, filed with the United States Supreme Court on this 11th day of December, 1980, was deposited in the U.S. Mail, postage prepaid, to opposing counsel, Michael DeWine, Greene County Prosecutor, Courthouse, Xenia, OH 45385, on this 10th day of December, 1980.

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